04

(1)

Supreme Court, U.S.
FILED

No. _____

08-159 MAY 12 2008

OFFICE OF THE CLERK

In The

Supreme Court of the United States

WILLIE LEE,

Petitioner,

v.

NEW ORLEANS POLICE DEPARTMENT,

Respondent.

On Petition For Writ Of Certiorari To The Louisiana Court Of Appeal, Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

KENNETH M. PLAISANCE
Attorney at Law
2061 North Miro Street
New Orleans, Louisiana 70119
Telephone: (504) 947-5297
Attorney for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

In *Cleveland Bd. of Educ. v. Loudermill,* 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985), this Court held that a tenured public employee has a right under the Due Process Clause to notice and a hearing before they are terminated. Rule IX, Section 1.2 of the New Orleans Civil Service Rules provides: in every case of termination of employment of a regular employee, the appointing Authority shall conduct a pre-termination hearing as required by law and shall notify the employee of the disciplinary action being recommended prior to taking action. The New Orleans Civil Service Commission ruled that the government violated petitioner's right to due process of law. The Louisiana 4th Circuit Court of Appeal affirmed by the Louisiana Supreme Court overturned the lower court's decision, and held that under unique circumstances such as a hurricane, the government can deny a pre-termination hearing, and ruled that a post-termination hearing satisfies the Due Process Clause of the United States and Louisiana Constitutions. The issues for review are:

1. Whether the failure to provide a pre-termination hearing pursuant to *Cleveland Bd. of Educ. v. Loudermill,* 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985) is no longer a violation of the Due Process Clause, if the denial of the pre-termination/ deprivation hearing is during a unique circumstance or extraordinary event such as a hurricane or flood.

QUESTIONS PRESENTED FOR REVIEW – Continued

2. Under what unique circumstance, extraordinary event, or emergency situation that the government can suspend the Due Process Clause of the United States Constitution.

3. Can the Government take a citizen's property during an emergency or extraordinary event other than war.

LIST OF PARTIES

Names of all parties appear in the caption of the case.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

LIST OF PARTIES iii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES vii

REFERENCE TO THE OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS 1

STATEMENT OF THE GROUNDS ON WHICH JURISDICTION OF THE SUPREME COURT IS INVOKED 1

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED IN THE CASE 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 6

I. The Decision Below Conflicts With Decisions Of This Court On Important Issues That Have Created Substantial Uncertainty In The Lower Courts Regarding Due Process As It Relates To Pre-Deprivation Hearings Before Taking Property And Whether A Post-Termination Hearing Satisfies The Due Process Clause Of The United States And Louisiana Constitutions. The Louisiana Appellate Courts' Interpretation Of The *Loudermill* Case As It Relates To The *Parratt-Hudson* Doctrine Conflicts With The Decision Of This Court 9

TABLE OF CONTENTS – Continued

Page

A. Background 9

B. The Present Circuit Split 11

II. The Louisiana Appellate Courts' Interpretation Of The *Loudermill* Case As It Relates To "A Unique Circumstance Or An Emergency Situation" – The *Doctrine Of Emergency* Conflicts With The Decision Of This Court 14

A. The Louisiana appellate courts makes the ruling in *Cleveland Board of Education v. Loudermill* obsolete or optional 14

B. The Louisiana 4th Circuit Court of Appeal affirmed by the Louisiana Supreme Court erroneously interpreted the law and fashioned new law (the Doctrine of Emergency) from cases which had nothing to do with public sector employment law as it relates to civil service terminations, due process and equal protection of the law 20

CONCLUSION 23

TABLE OF CONTENTS – Continued

Page

APPENDIX

A. Louisiana 4th Circuit Court of Appeal Decision, October 10, 2007 ..... App. 1

B. Order from the New Orleans Civil Service Commission Administrative Judge ..... App. 22

C. Louisiana Supreme Court Final Decision Denial Of The Writ, February 15, 2008 .... App. 29

D. Fifth Amendment of the U.S. Constitution ..... App. 31

E. Fourteenth Amendment of the United States Constitution ..... App. 31

TABLE OF AUTHORITIES

Page

CASES

Armstrong v. Manzo, 380 U.S. 545, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965) 16

Arnett v. Kennedy, 416 U.S. 134, 94 S.Ct. 1633, 40 L.Ed.2d 15 (1974) 16

Barry v. Barchi, 443 U.S. 55 (1979) 19

Bell v. Dept. of Health and Human Resources, 483 So.2d 945 (La.), cert. denied, 479 U.S. 827, 107 S.Ct. 105 (1986) 9, 16, 18

Board of Regents of State Colleges v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972) 16

Boddie v. Connecticut, 401 U.S 371 (1971) 9

Brumfield v. Department of Fire, 534 So.2d 582 (La. App. 4th Cir. 1989) 10

Brumfield v. Department of Fire, 488 So.2d 1181 (La. App. 4th 1986) 10

Cleveland Bd. of Education v. Loudermill, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985) ..... *passim*

Cronin v. Town of Amesbury, 81 F.3d 257 (1st Cir. 1996) 12

Dwyer v. Regan, 777 F.2d 825 (2nd Cir. 1985) 12

Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594 (1950) 19

Ex parte Milligan, 4 Wall. 2 (1866) 22, 24

TABLE OF AUTHORITIES – Continued

Page

Field v. Durham, 909 F.2d 94 (4th Cir. 1990).....12

Fields v. State of Louisiana, et al., 714 So.2d 1244 (La. 1998).....17

Findeleisen v. North East Independent School District, 749 F.2d 234 (5th Cir. 1984).....12

Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972).....16

Honey v. Distelrath, 195 F.3d 531 (9th Cir. 1999).....12

Hudson v. Palmer, 468 U.S. 517 (1984).....*passim*

Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982).....10

Lolling v. Patterson, 966 F.2d 230 (7th Cir. 1992).....12

Mathews v. Eldridge, 424 U.S. 319 (1976).....11

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).....9

New Orleans Ass'n of Firefighters Local 632 v. Civil Service Comm's of the City of New Orleans, 495 So.2d 958 (La. App. 4th Cir. 1986), writ denied, 499 So.2d 84 (La. 1987).....10

North American Cold Storage Company v. City of Chicago et al., 211 U.S. 306, 29 S.Ct. 101, 53 L.Ed 195 (1908).....19

O'Neill v. Baker, 210 F.3d 41 (1st Cir. 2000).....12

Parratt v. Taylor, 451 U.S. 527 (1981).....*passim*

TABLE OF AUTHORITIES – Continued

Page

Perry v. Sindermann, 408 U.S. 593, 92 S.Ct. 2692, 33 L.Ed.2d 548 (1972) 16

Robinson v. Winslow, 88 Fed. Appx. 93 (7th Cir. 2004) 12

Strasburge v. Board of Educ., 143 F.3d.351 (7th Cir. 1998) 12

Webb v. Department of Safety & Permits, 543 So.2d 582 (La. App. 4th Cir. 1989) 10

Wilson v. City of New Orleans, 479 So.2d 891 (La. 1985) 18, 19

Zinermon v. Burch, 494 U.S. 532 (1990) 14

U.S. CONSTITUTION

Fifth Amendment of the U.S. Constitution 2, 6

Fourteenth Amendment of the U.S. Constitution 2, 6

LOUISIANA CONSTITUTION

Article I, Section 2 of the Louisiana Constitution 2, 6, 7

Article I, Section 3 of the Louisiana Constitution 2, 7

STATUTES

28 U.S.C. section 1257(a) 1

TABLE OF AUTHORITIES – Continued

Page

Rule IX, Section 1.2 of the Louisiana Civil Service 2, 7, 13

Ala. Code 36-26-103 13

Ky. Rev. Stat. 18A095 13

La. R.S. 32.863 17

Mass. Gen. Law Ch. 35, Section 51 13

TREATISE

Novak, J., Handbook on Constitutional Law, Ch. 15, p. 477 (1978) 16

PETITION FOR WRIT OF CERTIORARI

Willie Lee petitions this Court to issue a writ of certiorari to review a judgment of the Louisiana Supreme Court affirming the Louisiana 4th Circuit Court of Appeal's ruling that the trial court erred by ruling that a civil service is not entitled to pre-termination hearing (due process and equal protection) before the civil servant is terminated.

REFERENCE TO THE OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS

As far as petitioner is aware, the lower court and court of appeals decisions are unreported. Both decisions are reproduced in the appendix.

STATEMENT OF THE GROUNDS ON WHICH JURISDICTION OF THE SUPREME COURT IS INVOKED

The date of the Order of the Louisiana Supreme Court sought to be reviewed: February 15, 2008. The statutory provision believed to confer on this Court jurisdiction to review by writ of certiorari is 28 U.S.C. section 1257(a).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED IN THE CASE

Fifth Amendment of the U.S. Constitution provides that:

> No person . . . shall be deprived of life, liberty, or property, without due process of law . . .

Fourteenth Amendment of the U.S. Constitution provides that:

> . . . **nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the law.**

Article I, Section 2 of the Louisiana Constitution provides that:

> No person shall be deprived of life, liberty, or property, except by due process of law.

Article I, Section 3 of the Louisiana Constitution provides that:

> No person shall be denied the equal protection of the laws . . .

Rule IX, Section 1.2 of the New Orleans Civil Service Rules provides:

> In every case of termination of employment of a regular employee, the appointing Authority shall conduct a pre-termination hearing as

required by law and shall notify the employee of the disciplinary action being recommended prior to taking action.

STATEMENT OF THE CASE

Petitioner was a classified, permanent civil servant/public employee with the New Orleans Police Department. Petitioner took off prior to the storm to take care of his wife who had operations on both feet. On August 29, 2005, Hurricane Katrina struck the City of New Orleans causing widespread flooding and mayhem. On Thursday, September 1, 2005, the United States Army arrived in New Orleans and secured New Orleans.

The government did not allow the citizens of New Orleans (including petitioner) to return to the city until October 2005. There were blockades in every entrance to the City of New Orleans. During this period of time, communication such as cell phone and land phones were not working.

Nevertheless, two months later on October 24, 2005, the New Orleans Police Department terminated petitioner for allegedly abandoning her job. Respondent terminated petitioner without a pre-termination hearing (without notice or an opportunity to be heard). Petitioner timely filed a civil service appeal with the New Orleans Civil Service Commission for the alleged disciplinary action taken against her by the respondent.

Course Proceedings In The Courts Below

A hearing was set for March 9, 2006. Prior to the hearing, Allen filed a motion for summary disposition and wanted a decision on the issues of due process and equal protection of the law before the trial on the merits. The Civil Service Commission failed to set the motion of summary disposition.

On March 9, 2006, the hearing officer did not grant petitioner's request for a continuance, failed to rule on petitioner's motion for summary disposition and forced a trial by threatening to dismiss the civil service appeal.

The hearing officer failed to rule on petitioner's motion for summary disposition based on a violation of due process. Nonetheless, it was improper to have a trial on the merit when a motion for summary disposition was pending before the administrative court.

Petitioner was denied due process of the law (a second time) and equal protection of the law regarding her motion for summary disposition.

On December 1, 2006, the New Orleans Civil Service Commission ruled that the respondent violated petitioner's due process rights by failing to give petitioner a pre-termination hearing. The New Orleans Civil Service Commission ordered the respondent to reinstate petitioner with all back pay and emoluments as a result of the respondent's violation of petitioner's due process rights.

Respondent filed its appeal to the Louisiana 4th Circuit Court of Appeal. Respondent moved the court to consolidate all cases similarly situated. The Louisiana 4th Circuit Court of Appeal denied respondent's motion to consolidate. However, in a strange move, the Louisiana 4th Circuit Court of Appeal consolidated all cases similarly situated. (See caption of the Court of Appeals judgment)

On October 10, 2007, the Louisiana 4th Circuit Court of Appeal reversed the New Orleans Civil Service Commission stating that under certain circumstances the government can violate the Due Process Clause of the United States and Louisiana Constitutions. Petitioner filed a motion to reconsider. The Louisiana 4th Circuit Court of Appeal denied petitioner's motion to reconsider. Petitioner filed a writ of certiorari to the Louisiana Supreme Court.

On February 15, 2008, the Louisiana Supreme Court denied Petitioner's writ. Petitioner files this writ of certiorari to review the lower court's overturning of *Cleveland Bd. of Educ. v. Loudermill,* 470 U.S. 532, 538-39 (1985) and when and under what circumstances can the government suspend the Due Process Clause of the United States Constitution.

REASONS FOR GRANTING THE WRIT

The Louisiana 4th Circuit Court of Appeal affirmed by the Louisiana Supreme Court fashioned new law in contravention to the well-settled law in *Cleveland Board of Education v. Loudermill,* 470 U.S. 532 (1985). This court held that a government shall not terminate a tenured public employee without notice and opportunity to be heard prior to the taking of the public employee's property and liberty interest of employment. The Louisiana appellate court ruled that during a unique circumstance, such as a hurricane, the government can deny due process of the law and that a post-termination hearing satisfies the Due Process Clause of the United States Constitution. Louisiana Courts along with several United States Courts of Appeals are split on the issue of pre-termination and post-termination hearing as it relates to due process. Certiorari is warranted to reimpose the authority of this Court's precedents in this important area of the law and to resolve the circuit split regarding due process as it relates to pre-deprivation hearing and post-termination trials.

The Fifth Amendment[1] and Fourteenth Amendment of the United States Constitution,[2] Article I,

---

[1] The Fifth Amendment of the U.S. Constitution provides that: "No person . . . shall be deprived of life, liberty, or property, without due process of law . . . "

[2] The Fourteenth Amendment of the U.S. Constitution provides that: " . . . **nor shall any State deprive any person of life, liberty, or property, without due process of law,**

(Continued on following page)

Section 2 and Section 3 of the Louisiana Constitution,[3] Rule IX, Section 1.2 of the New Orleans Civil Service Rules[4] and *Cleveland Bd. of Educ. v. Loudermill,* 470 U.S. 532, 538-39 (1985) promulgates that when the government contemplating termination of a classified civil servant, the government shall conduct a pre-termination hearing.

In this case, the respondent terminated petitioner without conducting a pre-termination hearing. Although, the New Orleans Civil Service Commission properly ruled that respondent violated petitioner's due process rights, the Louisiana 4th Circuit Court of Appeal ruled that in unique circumstances a post-termination hearing (after taking a citizen's property) satisfies the due process clause of the United States Constitution. The Louisiana Supreme Court denied writ. The Louisiana appellate courts have taken a narrower view that during hurricane, tornadoes and

---

nor deny to any person within its jurisdiction the equal protection of the law."

[3] Article I, Section 2 of the Louisiana Constitution provides that: "No person shall be deprived of life, liberty, or property, except by due process of law. Article I, Section 3 of the Louisiana Constitution provides that: No person shall be denied the equal protection of the laws . . . "

[4] Rule IX, Section 1.2 of the Louisiana Civil Service provides: "in every case of termination of employment of a regular employee, the appointing authority shall conduct a pre-termination hearing as required by law and shall notify the employee of the disciplinary action being recommended prior to taking action."

earthquakes the government can take a citizen's property without due process of the law.

The case is appropriate for review because the 4th Circuit Court of Appeal erroneously interpreted the law and fashioned new law (the Doctrine of Emergency) from cases which had nothing to do with public sector employment law as it relates to civil service terminations, due process and equal protection of the law. The Louisiana 4th Circuit Court of Appeal set a dangerous precedent, in that, during a time of a "unique circumstance," a citizen's property right can be taken without due process.

The 4th Circuit Court of Appeal gave no primary source of law or case law to specifically address whether the aftermath of a hurricane can be declared a "unique circumstance" in order to violate the Due Process and Equal Protection Clauses of the Louisiana and United States Constitutions.

Petitioner argues that neither the U.S. Constitution nor the Louisiana Constitution recognize "an emergency or unique circumstance" such as a hurricane, can justify suspending the requirement of due process and equal protection of the law. Nevertheless, petitioner argues that even if there are circumstances in which the government can violate the due process clause, the Louisiana 4th Circuit Court of Appeal failed to determine under what circumstance can the government violate due process and equal protection of the law; and failed to distinguish among the degrees of severity of the circumstance in which due

process can be violated. The lower court failed to address whether there were a combination of circumstances, whether the event constituted a widespread emergency or nationwide emergency (such as Civil War, World War I and II, the Great Depression or War on terror), or whether the event was an exceptional circumstance or ***just a challenging situation.***

I. The Decision Below Conflicts With Decisions Of This Court On Important Issues That Have Created Substantial Uncertainty In The Lower Courts Regarding Due Process As It Relates To Pre-Deprivation Hearings Before Taking Property And Whether A Post-Termination Hearing Satisfies The Due Process Clause Of The United States And Louisiana Constitutions. The Louisiana Appellate Courts' Interpretation Of The *Loudermill* Case As It Relates To The *Parratt-Hudson* Doctrine Conflicts With The Decision Of This Court.

A. Background

This Court has held that, as a general matter, the Due Process Clause of the United States Constitution requires state officials to provide notice and an opportunity to be heard prior to depriving individuals of life, liberty or property. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985); *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950); see *Bell v. Dep't of Health and Human Res.*, 483 So.2d

945 (La.), cert. denied, 479 U.S. 827, 107 S.Ct. 105 (1986); *Webb v. Department of Safety & Permits*, 543 So.2d 582 (La. App. 4th Cir. 1989); *Brumfield v. Department of Fire,* 534 So.2d 582 (La. App. 4th Cir. 1989); *Brumfield v. Department of Fire,* 488 So.2d 1181 (La. App. 4th 1986); see also, *New Orleans Ass'n of Firefighters Local 632 v. Civil Service Comm's of the City of New Orleans*, 495 So.2d 958 (La. App. 4th Cir. 1986), writ denied, 499 So.2d 84 (La. 1987). The rule is not without exceptions, however, and whether a pre-deprivation hearing is required must be determined in different contexts through a balancing of competing individual and state interests. See, e.g., *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 436 (1982).

The dispute in this case is over which circumstances or events can this Court apply to the balancing test to determine whether a person was denied due process by state official's failure to provide a pre-deprivation hearing.

In *Parratt v. Taylor,* 451 U.S. 527 (1981), this Court considered whether an inmate has a right to a pre-deprivation hearing before prison officials negligently lost his mail-order hobby kit. This Court held that it was difficult to conceive of how the State could provide a meaningful hearing before the deprivation takes place. *Id.* at 541. As a result, the Court held that an adequate post-deprivation tort remedy was all the Due Process Clause required. *Ibid.* In *Hudson v. Palmer,* 468 U.S. 517 (1984), this Court extended *Parratt* to a case in which a prison guard intentionally

deprived a prisoner of his personal property and legal papers without a pre-deprivation hearing. These cases established "the *Parratt-Hudson*" doctrine.

Applying the competing interests test in *Mathews v. Eldridge,* 424 U.S. 319 (1976), this Court concluded that the employee had a substantial interest in retaining his employment, that providing a pre-termination hearing "is obvious in reaching an accurate decision, and that the governmental interest in immediate termination does not outweigh these interests." 470 U.S. at 543-44.

In contrast to the unusual circumstances in *Parratt* and *Hudson* in which a pre-deprivation hearing was not feasible, this Court held in *Loudermill,* that, in the employment context, it was entirely feasible to provide a pre-termination hearing because "affording the employee an opportunity to respond prior to termination would impose neither a significant administrative burden nor intolerable delays." *Id.* at 544. Accordingly, this Court concluded that "some form of pre-termination hearing" was required before a tenured public employee may be terminated. *Id.* at 542.

B. The Present Circuit Split

The courts of appeals (including the Louisiana Appellate Courts) are divided over whether *Parratt* and *Hudson* create an exception to the rule of *Loudermill.*

The First and Seventh Circuits (along with the Louisiana Appellate Courts) have held that, under *Parratt-Hudson,* no due process violation occurs when a government official denies a pre-deprivation hearing to a tenured employee, so long as the denial is also in violation of state law and the state provides a post-deprivation. *O'Neill v. Baker,* 210 F.3d 41, 50 (1st Cir. 2000); *Cronin v. Town of Amesbury,* 81 F.3d 257, 260 (1st Cir. 1996); *Lolling v. Patterson,* 966 F.2d 230 (7th Cir. 1992); *Robinson v. Winslow,* 88 Fed. Appx. 93, 95 (7th Cir. 2004); *Strasburge v. Board of Educ.,* 143 F.3d 351, 358 (7th Cir. 1998) (dismissing due process claim of tenured teacher who was dismissed without a pre-termination hearing because post-deprivation remedies are adequate).

Four other circuits have rejected that a post-deprivation remedy is adequate to satisfy the due process clause of the United States Constitution. The Second, Fourth, Ninth and Fifth Circuits of the United States Courts of Appeals, rejected the *Parratt-Hudson* doctrine, and concluded in the context of tenured and public employment, State Officials must give a pre-termination hearing to permanent public employees. *Field v. Durham,* 909 F.2d 94, 96-97 (4th Cir. 1990); *Findeleisen v. North East Independent School District,* 749 F.2d 234, 238-39 (5th Cir. 1984); and *Dwyer v. Regan,* 777 F.2d 825 (2nd Cir. 1985); *Honey v. Distelrath,* 195 F.3d 531 (9th Cir. 1999).

The divisions and confusion are senseless. Consistent with *Loudermill,* civil service schemes throughout the country have incorporated the right to

a pre-termination hearing for permanent public employees in order to comply with the requirements of the Due Process Clause.[5] The decision in the Fourth and Seventh Circuits of the United States Courts of Appeals along with the Louisiana State Appellate Courts now raise the question whether the right recognized in *Loudermill* will continue to have any practical significance. For the Louisiana appellate courts along with the U.S. Fourth and Seventh Circuit Courts of Appeals relieves the state officials of the constitutional obligation of providing a pre-termination hearing.

Thus, because of the conflict of law in the Circuits, a permanent public employee in Boston or Chicago and in Louisiana has no federal redress when the hearing is not provided, while the courts in New York and Los Angeles will ensure that the hearing is required by *Loudermill*.

The decision of the Louisiana Appellate Courts warrants review because it is in contravention to this Court's precedents. The Louisiana appellate courts set a dangerous precedent regarding denying due

---

[5] See, e.g., Ala. Code 36-26-103, Ky. Rev. Stat. 18A095, Mass. Gen. Law ch. 35, Section 51. Rule IX, Section 1.2 of the Louisiana Civil Service provides: "in every case of termination of employment of a regular employee, the appointing authority shall conduct a pre-termination hearing as required by law and shall notify the employee of the disciplinary action being recommended prior to taking action."

process during a unique circumstance, extraordinary event or emergency situation.

The issue is under what unique circumstance, extraordinary event, or emergency can the government suspend the due process clause of the United States Constitution.

II. The Louisiana Appellate Courts' Interpretation Of The *Loudermill* Case As It Relates To "A Unique Circumstance Or An Emergency Situation" – The *Doctrine of Emergency* Conflicts With The Decision Of This Court.

A. The Louisiana appellate courts make the ruling in *Cleveland Board of Education v. Loudermill* obsolete or optional.

Again, *Cleveland Board of Education v. Loudermill,* answered the basic constitutional question posed in this case, holding that a tenured public employee like petitioner has a federal constitutional right to a hearing before he/she is terminated, regardless of the availability of a post-termination trial. The Louisiana 4th Circuit Court of Appeal's (affirmed by the Louisiana Supreme Court) conclusion to the contrary is based on a misconception of the *Parratt-Hudson* Doctrine, a misconception that has been corrected by *Zinermon v. Burch,* 494 U.S. 532 (1990). It is also a misconception that a government can

suspend due process during the time of crisis or emergency.

In *Loudermill,* this Court reached a clear conclusion – that a post-termination trial was insufficient to satisfy due process. See *id.* at 537-38. The Court observed that "some kind of hearing" is required for the employee to present his side of the case. A pre-termination hearing is warranted to reach an accurate decision.

Yet in this case, the Louisiana 4th Circuit Court of Appeal held precisely the opposite, concluding that under unique circumstances, a post-termination hearing satisfy the due process clause of the United States Constitution. By not determining under what circumstances or emergency, the Louisiana Appellate Court's rule applies to effectively render a pre-termination hearing constitutionally optional or obsolete. This Court held in *Loudermill*, that a post-termination hearing is inadequate.

Petitioner argues that the Louisiana 4th Circuit Court of Appeal's decision conflicts with this Court and its decision is a significant issue of law which has not been, but should be, resolved by this Court.

It was conceded by the Louisiana 4th Circuit and the Louisiana Supreme Court that an employee who has obtained classified and permanent civil service status has a property right in his employment and

future employment, under the United States Constitution and the Louisiana Constitution.[6]

Under our constitution and the civil service rules, an employee who has gained classified and permanent civil service status has an entitlement to his/her position, since he/she has already received the position, and applicable law guarantees him/her continued employment. Having concluded that a classified permanent employee enjoys a property right in maintaining his status, it is axiomatic that his position may not be changed or abolished without due process of law. Moreover, an equal concomitant to this right, thus, is "the right to notice and opportunity to be heard" **which must be extended at a meaningful time and in a meaningful manner**. *Fuentes v. Shevin, supra.* In *Bell,* the Louisiana Supreme Court held that "where the power of the government or agency is to be used against an individual there is a right to a fair procedure to determine the basis for, and the legality of, such action." *Novak, J., Handbook on Constitutional Law,* Ch. 15, p. 477 (1978). The Courts have frequently recognized the severity of depriving a person of income and such a deprivation

---

[6] See *Cleveland Bd. of Educ. v. Loudermill,* 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985); *Arnett v. Kennedy,* 416 U.S. 134, 94 S.Ct. 1633, 40 L.Ed.2d 15 (1974); *Perry v. Sindermann,* 408 U.S. 593, 92 S.Ct. 2692, 33 L.Ed.2d 548 (1972); *Board of Regents of State Colleges v. Roth,* 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972); *Fuentes v. Shevin,* 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972); *Armstrong v. Manzo,* 380 U.S. 545 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965).

without due process is a violation of the United States and Louisiana Constitutions. It is paramount to a "taking" of property.

Nevertheless, the cases that the Louisiana 4th Circuit Court of Appeal relied upon are distinguishable from cases relating to terminating and depriving a classified civil servant's property. The Louisiana 4th Circuit concedes that petitioner had a property interest of future employment, but in the same breath it allowed the government to take petitioner's property and then have a hearing on the matter. The cases cited by the 4th Circuit to attempt to change precedent has nothing to do with terminating a classified permanent civil servant. Fourth Circuit cited *Fields v. State of Louisiana, et al.*, 714 So.2d 1244 (La. 1998) for the rule that La. R.S. 32:863 (impounding vehicle without documentation of insurance) gave motor vehicle owners adequate notice that their automobile may be impounded if they could not provide proof of insurance to an investigation officer, and thus, a post-deprivation hearing did not violate the due process clause of the United States Constitution.

The *Fields* case is distinguishable from the instant cases because that facts and laws are different from Civil Service rule and regulations regarding civil service employment termination. Petitioner was entitled by law to receive a pre-deprivation hearing because of her property interest in employment. Petitioner has a property interest of at least $300,000.00 plus a pension. (Ten years of employment

multiplied by $30,000.00). Petitioner's property interest is far more than a vehicle or insurance.

The 4th Circuit cited *Bell v. Dept. of Health and Human Resources,* 483 So.2d 945 (La. 1986) for the contention that under extraordinary emergency conditions due process is fulfilled by a "post-deprivation hearing." The Louisiana Supreme Court held that in some instance due process is fulfilled by a "post-deprivation" hearing, **such as a reallocation of a pay situation**, however, it does not apply to termination which is a significant property deprivation.

The *Bell* case was distinguishable from the instance case because in *Bell* the due process issue revolved around reallocation of employment pay and not termination. In *Bell,* the Louisiana Supreme Court cited *Cleveland Bd. of Educ., supra,* which dealt with a termination situation where the affected employee would lose his pay immediately. Again, in this particular instance, petitioner was a classified permanent civil servant, she had a property and liberty right of employment and future employment, and thus, had due process rights.

The Louisiana 4th Circuit cites *Wilson v. City of New Orleans,* 479 So.2d 891 (La. 1985), for the rule that routine daily immobilization of automobiles without notice and opportunity to be heard was a violation of the due process clause. The Louisiana Supreme Court spoke about unusual situations justifying outright seizure without due process, but

ruled that before the government can seize property it must give notice and an opportunity to be heard. In *Wilson,* the Louisiana Supreme Court cites several secondary sources of law on a vehicle; immobilization and automobile towing cases, but the *Wilson case had nothing to do with terminating a civil servant with a property interest.* The Louisiana 4th Circuit cites *North American Cold Storage Company v. City of Chicago, et al.,* 211 U.S. 306, 29 S.Ct. 101, 53 L.Ed. 195 (1908). *North American Cold Storage* case dealt with seizure and destruction of poultry that was contaminated. The City of Chicago seized contaminated poultry without notice for health reasons. The *North American Cold Storage* case is distinguishable to the *Allen* case, because it had nothing to do with violation of a civil servant's due process and equal protection of the law. In *Ewing v. Mytinger & Casselberry, Inc.,* 339 U.S. 594 (1950), the Court ruled that the administrator of the Food and Drug and Cosmetic Act has probable cause to act without a hearing, if he/she believes that some product is dangerous to health. Again, this case is distinguishable to the instance case. In *Barry v. Barchi,* 443 U.S. 55 (1979) the Court ruled that suspension of horse trainer license was in violation of due process as to post-suspension. None of the above cases address Civil Service Rules as to termination without due process and equal protection of the law, nor do the above cases address taking property without due process in "unique circumstances."

In this particular instance, petitioner was a classified permanent civil servant, and she had a property and liberty right of employment and future employment. Thus, the government could not take petitioner's property without due process.

However, on October 24, 2005 (two months after Hurricane Katrina) respondent terminated petitioner without notice or an opportunity to be heard. Respondent violated petitioner's constitutional right of due process.

B. The Louisiana 4th Circuit Court of Appeal affirmed by the Louisiana Supreme Court erroneously interpreted the law and fashioned new law (the Doctrine of Emergency) from cases which had nothing to do with public sector employment law as it relates to civil service terminations, due process and equal protection of the law.

Again, the Louisiana 4th Circuit Court of Appeal affirmed by the Louisiana Supreme Court set a dangerous precedent, in that, it held that Hurricane Katrina was an extraordinary event, such that a post-termination hearing (after the taking of a citizen's property) satisfies the due process requirements of both the United States and Louisiana Constitutions. The 4th Circuit Court of Appeal gave no primary source of law or case law to specifically address whether the aftermath of a hurricane can be declared an "unique circumstance" in order to violate or suspend the Due

Process and Equal Protection Clauses of the Louisiana and United States Constitutions.

Petitioner argues that neither the U.S. Constitution nor the Louisiana Constitution recognizes "an emergency or unique circumstance" such as a hurricane can justify suspending the requirement of due process and equal protection of the law. Nevertheless, petitioner argues that even if there are circumstances in which the government can violate the Due Process clause, the 4th Circuit Court of Appeal failed to determine under what circumstance can the government violate due process and equal protection of the law; and failed to distinguish among the degrees of severity of the circumstance in which due process can be violated. The Court failed to address whether there was a combination of circumstances, whether the event constituted a widespread emergency or nationwide emergency (such as Civil War, World War I and II, the Great Depression or War on terror), or whether the event was an exceptional circumstance or just a challenging situation.

The question at hand is: Should the Constitutional safeguards to our individual liberties be set aside or suspended because of a unique circumstance, crisis or emergency? The Louisiana 4th Circuit affirmed by the Louisiana Supreme Court has produced a climate of permanent change of traditional notions of fair play and constitutional protections. The notion of constitutional due process guaranteeing a fair hearing before there is a taking of property is being

sharply modified to facilitate governmental convenience at the expense of individual rights.

The 4th Circuit Court of Appeal failed to cite case law that specifically held that in a catastrophe such as an aftermath of a hurricane, the government can suspend due process and equal protection of the law. The cases that come close to address "the emergency doctrine" are cases during the time of war.

Petitioner argues that no provision of the Constitution (including due process) can be suspended even during any great exigencies of government. Petitioner cites *Ex parte Milligan*, 4 Wall. 2 (1866) in which the U.S. Supreme Court imposed its own view concerning emergencies even in the Civil War era. It held that

> the constitution of the United States is a law for rulers equally in war and peace and covers with the shield of its protection all classes of men, at all times and under all circumstances. No doctrine involving more pernicious consequences was ever invented by the wit of man than that **any of its provisions can be suspended during any of the great exigencies of government . . .** The government within the Constitution has all the powers granted to it which are necessary to preserve its existence.

With this premise in mind, the only time in which the government can suspend civil liberties is during a war or a "War on terror." The Louisiana 4th Circuit Court of Appeal failed to address whether this

"unique circumstance" was merely a challenging situation.

Petitioner requested leave to take care of his wife during and after Hurricane Katrina. Two months later he was terminated for abandoning his assigned post. The Louisiana 4th Circuit Court of Appeal failed to address whether at the time of petitioner's departure, was there an exceptional circumstance or was the circumstance down graded to a challenging situation because the U.S. Army secured the City of New Orleans. Furthermore, at the time of the termination or deprivation of petitioner's property (October 24, 2005, – some two months after Hurricane Katrina), respondent could have given petitioner a pre-termination hearing or an emergency suspension.

CONCLUSION

Neither the U.S. Constitution nor the Louisiana Constitution recognizes "an emergency or unique circumstance" such as a hurricane that can justify suspending the requirement of due process and equal protection of the law.

In fashioning new law, the Louisiana courts failed to address whether the "unique circumstance" was an emergency, a combination of circumstances; whether the event constituted a widespread emergency or nationwide emergency (such as Civil War, World War I and II, the Great Depression or War on

terror); whether the event was an exceptional circumstance or ***just a challenging situation.***

It must be conceded that our Constitution was drafted to protect individual liberties over that of governmental interest. Currently, the Louisiana appellate courts seem to think that emergencies and crisis were not experienced by those who frame the Constitution. The Constitution was founded during crisis. The framers of the U.S. Constitution were confronted with a failing system of government at a time of crisis. They called for a constitutional convention to reform a failing system – "The Article of Confederation 1781." The States were competing for land and France and Great Britain were threatening military action. The framers of the U.S. Constitution included dedicated patriots who put their lives on the line by declaring independence from Great Britain and by taking up arms in defense of personal freedom and the right to have a voice in government. Petitioner must say that the situation of a man-made calamity (the flood following Hurricane Katrina) Louisiana was faced with, pale in comparison, to the threats which were a way of life for these patriots.

Nevertheless, our Constitution is suited to deal with modern problems. The framers of the Constitution made the Constitution in a time of crisis to handle such emergency situations. Again, in *Ex parte Milligan*, 4 Wall. 2 (1866) the U.S. Supreme Court held that "the Constitution of the United States is a law for rulers equally in war and peace and covers

with the shield of its protection all classes of men, at all times and **under all circumstances**."

With this in mind, the government cannot suspend the Constitution (including the due process clause) claiming a unique circumstance or emergency situation.

Nevertheless, the U.S. Courts of Appeals are split regarding post-deprivation hearings satisfying the Due Process Clause of the United States Constitution. The Louisiana 4th Circuit Court of Appeal was confused regarding pre-termination and post-termination/ deprivation hearing satisfying the due process clause. The Louisiana appellate courts fashioned law from a mis-interpretation of the Constitution. The 4th Circuit Court of Appeal failed to cite case law that specifically held that in a catastrophe such as an aftermath of a hurricane, the government can suspend due process and equal protection of the law.

Petitioner suggests that the aftermath of Katrina was a challenging time but had not risen to a level of emergency to suspend due process and equal protection of the law.

For all the foregoing reasons, petitioner prays that this Court grant the petition for writ of certiorari

and prays that the lower courts' decisions be reversed and remanded.

Respectfully submitted,

KENNETH M. PLAISANCE (19738)
Attorney for Petitioner
2061 North Miro Street
New Orleans, LA 70119
877-947-5297

APPENDIX A

967 So.2d 606

Court of Appeal of Louisiana, Fourth Circuit.

Rashi REED

v.

DEPARTMENT OF POLICE

Donna Aubert

v.

Department of Police

Shyra Allen

v.

Department of Police

Willie Lee

v.

Department of Police

Ronald Moore

v.

Department of Police

Eric Doucette

v.

Department of Police

Carl Davis

v.

Department of Police

Shawn Madison

v.

Department of Police

Rhonda Hill

v.

Department of Police

Kermit Henry

v.

Department of Police

Errol Washington

v.

App. 2

Department of Police
Leander Winford
v.
Department of Police.
Nos. 2006-CA-1498, 2006-CA-1500, 2006-CA-1647, 2007-CA-0171, 2007-CA-0360, 2007-CA-0361, 2007-CA-0364, 2007-CA-0366, 2007-CA-0367, 2007-CA-0368, 2007-CA-0796, 2007-CA-0797.

Oct. 10, 2007.
Rehearing Denied Nov. 15, 2007.

Gary M. Pendergast, Gary M. Pendergast, L.L.C., New Orleans, LA, for Rashi Reed, Eric Doucette and Rhonda Hill.

Cheryl Mitchel Gaines, Silver Spring, MD, for Donna Aubert.

Kenneth M. Plaisance, New Orleans, LA, for Shyra Allen and Willie Lee.

Frank G. DeSalvo, DeSalvo DeSalvo & Blackburn, APLC, New Orleans, LA, for Ronald Moore.

Rowena T. Jones, New Orleans Legal Assistance Corporation, New Orleans, LA, for Shawn A. Madison.

James E. Stovall, Covington, LA, for Leander Winford.

James B. Mullaly, Assistant City Attorney, Penya Moses-Fields, City Attorney, Heather M. Valliant, Assistant City Attorney, Joseph V. Dirosa, Jr., Chief

Deputy City Attorney, Victor L. Papai, Jr., Assistant City Attorney, New Orleans, LA, for Defendant/ Appellant.

Court Composed of Chief Judge JOAN BERNARD ARMSTRONG, Judge CHARLES R. JONES, Judge PATRICIA RIVET MURRAY, Judge JAMES F. McKAY III, Judge DENNIS R. BAGNERIS SR., Judge MICHAEL E. KIRBY, Judge TERRI F. LOVE, Judge MAX N. TOBIAS, Jr., Judge DAVID S. GORBATY, Judge EDWIN A. LOMBARD, Judge LEON A. CANNIZZARO, JR., Judge ROLAND L. BELSOME.

MAX N. TOBIAS, JR., Judge.

We consolidated these matters solely to consider the common issue of whether the New Orleans Civil Service Commission ("CSC") erred as a matter of law by holding that because the New Orleans Police Department ("NOPD") did not hold pre-termination hearings pursuant to CSC Rule IX, § 1.2, the discipline imposed against the plaintiffs/appellees, all NOPD officers, was illegal.[1] For the reasons that follow, we hold that Hurricane Katrina, with its effects upon the city of New Orleans and its government, was an extraordinary event such that the NOPD could

---

[1] Rule IX, § 1.2 provides:

> In every case of termination of employment of a regular employee, the appointing authority shall conduct a pre-termination hearing as required by law and shall notify the employee of the disciplinary action being recommended prior to taking action.

discipline the officers without a pre-termination hearing. We further hold that, under these unique circumstances, a post-termination hearing, which allows the accused officer an opportunity to present all relevant evidence he/she would have introduced at a pre-termination hearing to overturn the NOPD's decision, satisfies the due process requirements of both the United States and Louisiana Constitutions.[2]

The only issue before us is whether these officers were denied due process for the NOPD's failure to grant them a pre-termination hearing. In *Cleveland Bd. of Education v. Loudermill,* 470 U.S. 532, 542, 105 S.Ct. 1487, 1493, 84 L.Ed.2d 494 (1985), the United States Supreme Court stated:

> An essential principle of due process is that a deprivation of life, liberty, or property "be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane v. Central Hanover Bank &*

---

[2] An additional issue raised on appeal was whether the NOPD could rely upon Rule IX, § 1.1 of the CSC Rules as setting forth prohibited conduct by classified employees. Although the termination letters sent to each of the officers did not cite an internal NOPD rule violated by them, the letters stated that the officers had not reported to duty, had abandoned their posts, etc., without permission and/or contact with their chain of command. Under the circumstances, we find the NOPD's failure to cite a specific internal rule is without moment for such a violation is so obvious that a citation of authority is unnecessary. Thus, we find that *Knight v. Department of Police,* 619 So.2d 1116, 1120 (La.App. 4 Cir.), *writ denied,*625 So.2d 1058 (La.1993), is inapplicable to this case.

Trust Co., 339 U.S. 306, 313, 70 S.Ct. 652, 656, 94 L.Ed. 865 (1950). We have described "the root requirement" of the Due Process Clause as being "that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest." **FN7***Boddie v. Connecticut,* 401 U.S. 371, 379, 91 S.Ct. 780, 786, 28 L.Ed.2d 113 (1971) (emphasis in original); see *Bell v. Burson,* 402 U.S. 535, 542, 91 S.Ct. 1586, 1591, 29 L.Ed.2d 90 (1971). This principle requires "some kind of a hearing" prior to the discharge of an employee who has a constitutionally protected property interest in his employment. *Perry v. Sindermann,* 408 U.S. 593, 599, 92 S.Ct. 2694, 2698, 33 L.Ed.2d 570. As we pointed out last Term, this rule has been settled for some time now. *Davis v. Scherer,* 468 U.S. 183, 192, n. 10, 104 S.Ct. 3012, 3018, n. 10, 82 L.Ed.2d 139 (1984); *id.,* at 200-203, 104 S.Ct. 3022-3024 (BRENNAN, J., concurring in part and dissenting in part). Even decisions finding no constitutional violation in termination procedures have relied on the existence of some pretermination opportunity to respond. For example, in *Arnett* six Justices found constitutional minima satisfied where the employee had access to the material upon which the charge was based and could respond orally and in writing and present rebuttal affidavits. See also *Barry v. Barchi,* 443 U.S. 55, 65, 99 S.Ct. 2642, 61 L.Ed.2d 365 (1979) (no due process violation where horse trainer whose license was suspended "was given more than one

> opportunity to present his side of the story"). [Emphasis added.]

In footnote seven referenced above, the Court recognized an exception:

> **There are, of course, some situations in which a postdeprivation [sic] hearing will satisfy due process requirements.** See *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594, 70 S.Ct. 870, 94 L.Ed. 1088 (1950); *North American Cold Storage Co. v. Chicago,* 211 U.S. 306, 29 S.Ct. 101, 53 L.Ed. 195 (1908). [Emphasis added.]

In *Bell v. Dep't of Health and Human Res.*, 483 So.2d 945 (La.),*cert. denied,*479 U.S. 827, 107 S.Ct. 105, 93 L.Ed.2d 55 (1986), the Louisiana Supreme Court stated:

> The provisions of the state constitution involving the Civil Service, Article X, § 1 *et seq.*, and the Rules of the Commission are designed to secure adequate protection to the public career employee from political discrimination. They embrace the merit system, and their intent is to preclude favoritism. The purpose of the Civil Service Rules is **to guarantee** the security and welfare of the public service. *Sanders v. Department of Health & Human Resources*, 388 So.2d 768 (La.1980) (emphasis added). With this in mind, it is clear that tenure or classified civil service status is a property right within the meaning of Article I, § 2 of our constitution, a prerequisite to a due process challenge. *Delta*

Bank & Trust Co. v. Lassiter, 383 So.2d 330 (La.1980). Under our constitution and the Civil Service Rules, an employee who has gained classified permanent civil service status has an entitlement to his position, since he has already received the position, and applicable law guarantees him continued employment, save for some exceptions (i.e. disciplinary sanctions for cause). *Cleveland Bd. of Educ. v. Loudermill, supra; Arnett v. Kennedy,* 416 U.S. 134, 94 S.Ct. 1633, 40 L.Ed.2d 15 (1974); *Perry v. Sindermann,* 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972); *Board of Regents of State Colleges v. Roth,* 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). Having concluded that a classified permanent employee enjoys a property right in maintaining his status, it is axiomatic that his position may not be changed or abolished without due process of law. *Cleveland Bd. of Educ., supra.* The question becomes what process is due.

The decisions of the United States Supreme Court, as well as the jurisprudence of this state, underscore the truism that "'[d]ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Mathews v. Eldridge,* 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). It is a flexible standard and calls for such procedural protections as the particular situation demands. *Morrissey v. Brewer,* 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972). It is particularly flexible in the area of administrative

> law. *See Smith v. Division of Admin.*, 415 So.2d 381 (La.App. 1st Cir.1982); *Hamilton v. La. Health & Human Resources Admin.*, 341 So.2d 1190 (La.App. 1st Cir.1976), *writ refused,*344 So.2d 4 (La.1977). Where the power of the government or an agency is to be used against an individual there is a right to a fair procedure to determine the basis for, and the legality of, such action. Nowak, J., et al., *Handbook on Constitutional Law,* Ch. 15, p. 477 (1978).

Id. at 949-50. [Underlined emphasis added.]

In *Fields v. State Through Dept. of Public Safety and Corrections,* 98-0611, pp. 7-8 (La.7/8/98), 714 So.2d 1244, 1251, the Supreme Court clarified its position:

> Generally, before a person is deprived of a protected interest, he must be afforded some kind of hearing. However, this court has often recognized **there may be circumstances involving a valid governmental interest which justify postponing the hearing until after the event.** *In re Adoption of B.G.S.*, 556 So.2d 545, 553 (La.1990). A deprivation without opportunity for a prior hearing or other effective substitute safeguard has been allowed in "**extraordinary" or "truly unusual" situations.** *Paillot v. Wooton,* 559 So.2d 758, 762 (La.1990). "[E]mergency action may be proper pending a hearing when matters of public health and safety are involved." *Id. See also Wilson v. City of New Orleans,* 479 So.2d 891 (La.1985)

> and *Bell v. Department of Health and Human Resources,* 483 So.2d 945, 951(La.),*cert. denied,*479 U.S. 827, 107 S.Ct. 105, 93 L.Ed.2d 55 (1986) ("[W]e note that **there seems to be an emerging concept that in some instances due process is fulfilled by a 'post deprivation' hearing.** We believe that this view to procedural due process in certain situations is sound and is in support of our decision here.").

Id. [Emphasis added.]

It is unnecessary for this court to describe the emergency conditions existing in New Orleans during and after Hurricane Katrina. Thus, we note the obvious negative effect that an absence of discipline for these officers would have on those who remained at their posts under the most unusual and trying of circumstances. In *Stevens v. Department of Police,* 00-1682, p. 8 (La.App. 4 Cir. 5/9/01), 789 So.2d 622, 627, we stated:

> The public puts its trust in the police department as a guardian of its safety, and it is essential that the appointing authority be allowed to establish and enforce appropriate standards of conduct for its employees sworn to uphold that trust. *Newman, supra* [*v. Department of Fire,* 425 So.2d 753 (La.1983)]. Indeed, the Commission should give heightened regard to the appointing authorities that serve as special guardians of the public's safety and operate as quasi-military institutions where strict discipline is imperative.

We can hardly envision a scenario when enforcing appropriate standards of conduct was ever more important than in the aftermath of Hurricane Katrina. In addition, we find that the CSC's rulings relying solely on the absence of a pre-termination hearing when truly extraordinary circumstances present themselves would set a dangerous precedent on future disciplinary actions of the NOPD.

For the foregoing reasons, we find that the CSC erred in reversing the orders of discipline against the plaintiffs/appellees on the sole basis that no pre-termination hearings were afforded to them.

We therefore vacate the decisions of the CSC in each of these consolidated cases. We remand the cases to the CSC for them to receive from the parties such additional evidence as necessary to appropriately resolve each of the cases and to render a judgment on the merits of each case. In that regard, the CSC is specifically instructed to permit each of the plaintiffs/appellees to introduce at the post-termination hearing such additional evidence as he or she might have provided to the appointing authority at a pre-termination hearing if same had been afforded. The right of each party to appeal a new subsequent judgment of the CSC following its ruling on the merits of each case is preserved.

JUDGMENTS VACATED; REMANDED WITH INSTRUCTIONS.

CANNIZZARO, J., Concurs with Reasons.

BAGNERIS, J., Dissents for the Reasons Assigned by Judge LOMBARD.

LOVE, J., Dissents.

LOMBARD, J., Dissents.

BELSOME, J., Dissents with Reasons.

CANNIZZARO, J., Concurs with Reasons.

I concur in the result reached by the majority in that the New Orleans Civil Service Commission erred as a matter of law under the extraordinary circumstances of this case by requiring that the N.O.P.D. conduct a pre-termination hearing prior to disciplining the officers.

However, I would pretermit any and all discussion with regard to the remaining assignments of error since they are not germane to the issue of a pre-termination hearing.

Furthermore, the record does not reflect nor should we speculate as to the impact or effect of the discipline (or lack thereof) on other members of the N.O.P.D.

LOVE, J., Dissents.

I respectfully dissent for the reasons assigned by Judge Lombard.

LOMBARD, J., Dissents.

"The Constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decision making when it acts to deprive a person of his [property rights]." *Wilson v. City of New Orleans,* 479 So.2d 891, 894 (La.1985). It is undisputed that, historically, due process has been a fundamental precept of our legal system, *see Baldwin v. Hale,* 1 Wall. 223, 17 L.Ed. 531 (1864), or that the right to notice and an opportunity to be heard must be granted at "a meaningful time and in a meaningful manner." *Fuentes v. Shevin,* 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972).[1]

During and immediately after Hurricane Katrina swept through New Orleans on August 29, 2005, some police officers were absent from their posts. Nearly two months later, on October 24, 2005, letters were mailed to this group of officers, terminating them without any notice or opportunity to be heard, even though – as in the case of Officer Reed – many had contacted their supervisors in the days immediately

---

[1] *See also, Goss v. Lopez,* 419 U.S. 565, 580, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975)(citing *Joint Anti-Fascist Refugee Committee v. McGrath,* 341 U.S. 123, 71 S.Ct. 624, 95 L.Ed. 817 (1951)) (Frankfurter, J., concurring) (" '[F]airness can rarely be obtained by a secret one-sided determination of facts decisive of rights. . . . "Secrecy is not congenial to truth-seeking and self-righteousness gives too slender an assurance of rightness. No better instrument has been devised than to give a person in jeopardy of serious loss notice of the case against him and an opportunity to meet it.' ").

following the hurricane, were advised of a 30-day suspension, returned to New Orleans and were in contact with their immediate supervisors regarding reporting to duty at the end of the suspension period. In sanctioning the City's illegal termination of the officers nearly two months after Hurricane Katrina[2], the majority ignores the clear-cut procedural due process requirements of the federal and state constitutions[3], as well as the Rules of the New Orleans Civil Service Commission, and creates a dangerous new precedent.

---

[2] Notably, the City submitted no evidence into the record before the Commission or this court to support its claim that exigent circumstances required that due process requirements be cast aside approximately two months after Hurricane Katrina, although asserting that the City should be excused from failing to make any attempt to afford the accused officers minimal notice and opportunity to be heard because of exigent circumstances. Apparently, evidentiary rules as well as constitutional due process should be disregarded with regards to those cases arising out of the Hurricane Katrina aftermath. It is somewhat ironic, however, that the City argues that the catastrophic conditions following Hurricane Katrina created an excuse for the City's failure to follow clear constitutional mandates while, in effect, arguing that their employees should be afforded no opportunity to explain their own failures in the post-Katrina chaos.

[3] Both the Fourteenth Amendment to the United States Constitution and Article I, § 2 of the 1974 Louisiana Constitution specifically protect a person against deprivation of his/her life, liberty, or property with "due process of law", a term which simply means that persons whose rights may be affected are entitled to be heard and, in order to enjoy that right, must first be notified.

Even in extraordinary circumstances, an individual whose interests may be affected by a deprivation of life, liberty, or property must be granted a fair procedure before a fair decision maker.[4] In some circumstances, due process may not require a full-blown, trial-type hearing, but that is not to say that some sort of rudimentary precautions afforded by an informal notice and opportunity to respond are not necessary.[5] Due process is a flexible standard, *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972), and courts have been flexible in finding that a meaningful and prompt post-deprivation process will suffice where prior notice and opportunity to be heard is not a meaningful protection.[6]

---

[4] "To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense on the merits." Wilson, supra, (citing *Coe v. Armour Fertilizer Works*, 237 U.S. 413, 35 S.Ct. 625, 59 L.Ed. 1027 (1915)).

[5] *See Paillot v. Wooton*, 559 So.2d 758, 761 n. 3 (La.1990) (informal hearing process involving merely discussing with student misconduct which has occurred only moments before may be sufficient in some cases but "such opportunity must be provided"; post-deprivation notice and rudimentary hearing sufficient only "when student poses a continued threat of danger to persons or property or disruption to the academic process").

[6] *See Bell v. Department of Health and Human Resources*, 483 So.2d 945 (La.1986) (employment reallocation) and *Wilson, supra* (temporary impoundment of a vehicle when the owner fails to present proof of insurance); *see also Ewing v. Mytinger Casselberry, Inc.* 339 U.S. 594, 70 S.Ct. 870, 94 L.Ed. 1088 (1950) (challenged statute permitting multiple seizures of misbranded articles on a finding of probable cause by an administrator,

(Continued on following page)

Significantly, however, no other court has ever sanctioned a permanent deprivation/termination of employment implemented without pre-deprivation/ pre-termination of employment notice and hearing.[7]

While it may be emotionally satisfying or politically expedient to circumscribe the rights of a police officer accused of deserting his post in the midst of a community disaster, to do so in this case sets a dangerous precedent, curtailing important constitutional protections and overriding the long-held bright-line rule that a permanent deprivation requires pre-deprivation due process. Even accepting *arguendo* that Hurricane Katrina was an extraordinary event

---

without a hearing, is not unconstitutional under the due process clause); *North American Cold Storage Co. v. Chicago*, 211 U.S. 306, 29 S.Ct. 101, 53 L.Ed. 195 (1908) (due process of law is not denied the owner or custodian of food in cold storage by a municipal ordinance under which such food, when unfit for human consumption, may summarily be seized, condemned, and destroyed by municipal officers without a preliminary hearing); *F.D.I.C. v. Mallen*, 486 U.S. 230, 108 S.Ct. 1780, 100 L.Ed.2d 265 (1988) (bank official not entitled to pre-suspension hearing under statute authorizing suspension from office of indicted official of federally insured bank; important governmental interest in protecting depositors and maintaining public confidence, coupled with the fact that felony indictment provided sufficient assurance that suspension was not baseless, justified prompt action before suspensions hearing was held).

[7] *See, e.g., Bell*, 483 So.2d at 951 (distinguishing termination situation from reallocation); *Fields*, 714 So.2d at 1255 ("In the instant case, we are dealing only with the temporary impoundment of a motor vehicle because it did not contain the statutorily required proof of insurance").

allowing for the temporary curtailment of constitutional protections, these terminations took place nearly two months after that event.

The majority asserts, however, that the violation of the constitutional rights of these police officers should be sanctioned because "an absence of discipline" will result in an "obvious negative effect" on other officers who remained at their posts during the chaos and disorder following the levee breach.[8] To mischaracterize procedural due process prior to termination as an "absence of discipline" implies that police officers, alone of civil service employees, are not entitled to procedural due process. It is difficult to conceive that adopting this implication – that police officers are not entitled to the same constitutional and statutory protections as other similarly situated persons[9] – will bolster the morale of the police

---

[8] In a similar vein, the City characterized reinstatement with backpay as a "reward" and argued that its interest in "maintaining the battered public fisc", combined with the catastrophic conditions following Hurricane Katrina, outweighs any individual's right to a pre-termination hearing as long as some sort of post-deprivation hearing can be devised. Notably, no jurisprudence (including that cited by the City) supports the proposition that concern for public finances in the aftermath of a community catastrophe outweighs the due process rights of individuals or that a governmental entity is entitled to affirmation of its transgressions because to find otherwise will ultimately be at the cost of the public treasury, nor did the issue of the "battered public fisc" merit consideration in the recent decision, *DeCorte v. Jordan*, 497 F.3d 433 (5th Cir.2007).

[9] *See, e.g., Fuller, et al. v. Department of Fire*, 07-0369, 2007 WL 2966326, 968 So.2d 731 (La. 4 Cir. 9/19/07) (reversing

(Continued on following page)

department or validate the decisions of the police officers who reached their designated duty posts and remained throughout the storm's aftermath. The police department may be a *de facto* "quasi-military" institution but police officers are classified as civil servants under the law and, until that classification is changed, are entitled to all of the protections (including procedural due process) afforded civil service employees.[10]

Likewise, it is specious to say that due process will be satisfied by allowing the "accused officers" to supplement the record "with all relevant evidence he/she would have introduced at a pre-termination hearing to *overturn the NOPD's decision.*" (Emphasis added) The purpose of the right to be heard is to minimize the likelihood of a substantially unfair or mistaken deprivation. Thus, the intimation that a termination decision is pre-determined before the

---

suspension of firefighters who were absent from their posts after the hurricane, failing to return until well after the September 22, 2005, deadline imposed by the New Orleans Fire Department, because application of across-the-board deadline for return was arbitrary and capricious when co-workers had failed to convey cut-off date to them and firefighters "did the best they could under horrific conditions to return to work as quickly as possible").

[10] *See* CSC Rule IX § 1.2 (amended effective February 1, 1988; emphasis added) ("In every case of termination of employment of a regular employee, the Appointing Authority shall conduct a pre-termination hearing as required by law and shall notify the employee of the disciplinary action being recommended prior to taking action").

hearing, subordinating the hearing itself to an appeal of that decision, suggests a departure from the basic standards of due process.

Finally, the termination letter sent by the City, citing a civil service rule as the sole basis for dismissal is contrary to the clear language of Civil Service Rule IX and thus, as observed by the Commission, the officers have yet to be charged with a violation of an internal police department rule.[11] Presumably, the police department's internal rules address the officers' actions in these cases and, as the issue before the court is whether the officers were afforded their constitutional and statutory rights to *notice* and opportunity to be heard, not whether the officers' actions should ultimately serve as a basis for their termination, I disagree with the conclusion that the NOPD's failure to site a specific internal rule "is without moment."

---

[11] In *Knight v. Department of Police*, 619 So.2d 1116, 1118 (La.App. 4th Cir.), *writ denied*,625 So.2d 1058 (La.1993), the court clearly stated that Rule IX is directed to the appointing authorities and "simply cannot be construed as a rule setting forth prohibited conduct by classified employees." *Knight*, 619 So.2d at 1120; *see also Brumfield v. Department of Fire*, 488 So.2d 1181 (La.App. 4th Cir.1986) (reversing Commission's ruling that the Superintendent of the Fire Department acted within its boundaries of the regulations of the Department of Fire in invoking Rule IX of the Civil Service Commission to dismiss the plaintiff for inability or unwillingness to perform his duties basis for their termination).

Major disasters do not permit the curtailment of constitutional protections. Accordingly, I would affirm the Civil Service Commission's determination that a termination without the requisite due process is illegal.

For the foregoing reasons, I respectfully dissent.

BELSOME, J., Dissents with Reasons.

I respectfully disagree with the majority's opinion.

Our Supreme Court has recognized that the Civil Service Commission process was instituted to protect an employee's position, an acknowledged property right, from unwarranted employer abuses. *New Orleans Firefighters Assoc. v. Civil Service Commission of the City of New Orleans,* 422 So.2d 402 (La.1982). Potential governmental abuses are avoided through statutory regulations that must pass Constitutional muster. The protection afforded the employees in the instant case is found in Rule IX, § 1.2, which mandates that the appointing authority conduct a pre-termination hearing as well as notify the employee of their infraction.

Recently, the Supreme Court has further directed us to redefine the mandatory language contained within a statute. *Marks v. New Orleans Police Department,* 2006-0575 (La.2006), 943 So.2d 1028. In *Marks* the Court found that in the absence of any evidenced prejudice to the employee the word "shall"

was directive rather than compulsory. The "shall" in *Marks* referred to a 60-day time frame in which to investigate employees' misconduct. The Supreme Court reasoned that Marks' right to due process, notice and a right to be heard had not been violated by an investigation that exceeded the mandated 60-days.

Today we are confronted with tl e narrow issue of whether or not a post termination hearing meets the minimum due process requirements outlined by the United States Supreme Court in *Cleveland Board of Education v. Loudermill,* 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494. In *Loudermill* the Court addressed what process is due an employee with a constitutionally protected property right. *Id.* The Loudermill Court found that notice and a pre-termination hearing was the constitutionally adequate procedure to avail an employee of his/her due process rights. *Id.*

Here we are presented with employees whose hearings came months after they were deprived of their livelihood. No rational court could conclude that the Due Process Clause requirement for a hearing "at a meaningful time" was met. Presumably, the determination of constitutionally protected due process hinges on whether or not the employee is prejudiced by the delay, not whether the employer is inconvenienced by being held to the constitutional standard.

Although the employer has argued, and the majority accepts, that Hurricane Katrina created an

urgency that prevented pre-termination hearings, the records are void of any such evidence. Undoubtedly, Hurricane Katrina caused challenging situations that may or may not be designated as emergency conditions. But simply put, the Hurricane Katrina banner cannot be waived every time the government seeks to circumvent the constitution. Permitting such a broad excuse in the very limited question presented today opens the door for potential governmental abuse either through intent, incompetence, or indifference of employee rights. Arguably, this decision may negate collective bargaining agreements, as well as constitutionally protected rights in contract and habeas corpus.

This writer cannot join in an opinion that ignores the prejudice created by depriving an employee of his property right without the opportunity to first be heard and defend that right. The notion that due process was protected and no prejudice occurred when the employee was divested of his/her position first and allowed a post termination hearing months later is fictional. Allowing post termination hearings with no limitation on delays effectively abolishes the employees' constitutional right to due process.

Due process is most vulnerable when it is most warranted.

I dissent.

APPENDIX B

WILLIE LEE	CIVIL SERVICE COMMISSION
VERSUS	CITY OF NEW ORLEANS
DEPARTMENT OF POLICE	DOCKET NO. 7099

The Appointing Authority employed the Appellant as a Police Officer with permanent status. He was first hired by the Appointing Authority on February 4, 2001, and was promoted to his current class on March 24, 2002. The Appointing Authority terminated the Appellant by letter dated October 24, 2005. The letter informed the Appellant that he did not report to duty on August 28, 2005. The letter did not identify any police department rule violated by Appellant. Instead the Appointing Authority relied on Rule IX of the Rules of the Civil Service Commission of New Orleans that allows an Appointing Authority to take corrective action "when an employee in the classified service is unable or unwilling to perform the duties of his/her position in a satisfactory manner."

The matter was assigned by the Civil Service Commission to a Hearing Examiner pursuant to Article X, Section 12 of the Constitution of the State of Louisiana, 1974. The hearing was held on March 9, 2006. The testimony presented at the hearing was transcribed by a court reporter. The three undersigned members of the Civil Service Commission have

reviewed a copy of the transcript and all documentary evidence.

The Appellant testified without challenge that his wife had major surgery on both feet, and was disabled at the time Hurricane Katrina struck New Orleans. He spoke to his commander Captain Joseph Kirsch on September 6, 2005, and requested Family Medical Leave to care for his wife. He explained that no other persons were available to care for his wife, and that he would return from leave when his wife's condition no longer required his presence. He gave Capt. Kirsch the information needed to contact him. Capt. Kirsch rejected the Appellant's request for leave, and instructed him to return to work.

The Appellant returned on October 13, 2005. Capt. Kirsch informed him that Sgt. Todd Coleman was assigned to investigate his absence from duty. Sgt. Coleman testified that he spoke to the Appellant, but did not include his conversation in his investigation because the report concerning the Appellant was already submitted to the Appointing Authority.

The Appellant never received notice of the charges against him prior to his termination. In fact, the Appointing Authority never charged the Appellant with any violations of its internal rules. As reflected in the disciplinary letter, the Appointing Authority relied solely on Rule IX of the Rules of the Civil Service Commission. The Appellant was never afforded a pre-termination hearing prior to the Appointing Authority taking disciplinary action.

The Appointing Authority cannot rely solely on civil service rules as a justification for disciplinary action. The Fourth Circuit address that issue in *Knight v. Department of Police*, 619 So.2d 1116, 1118 (La. App. 4 Cir.) *writ denied,* 625 So.2d 1058 (La.1993)

> The City in a fall back position argues that Knight violated Rule IX Section 1.1 of the Civil Service Rules. That particular rule is directed to appointing authorities, such as Superintendent Woodfork, and requires appointing authorities to enforce rules of their department. It is a grant of authority to the appointing authority to discipline employees who commit any act prejudicial to the civil service, not a rule regulating police conduct. In essence, it says that when a civil service employee fails to perform or cannot perform "the appointing authority shall take action warranted by the circumstances to maintain the standards of effective service." To further illustrate that Rule IX is directed to the appointing authorities, Section 1.2 of Rule IX says that when the *appointing authority* is contemplating termination, the *appointing authority* shall conduct a pre-termination hearing, Rule IX simply cannot be construed as a rule setting forth prohibited conduct by classified employees.

The Fourth Circuit has consistently held on repeated occasions that Rule IX, Sect. 1.2 requires pre-termination notice of dismissal and an opportunity to respond. *Webb v. Department of Safety &*

Permits, 543 So.2d 582 (La.App. 4th Cir.1989); *Brumfield v. Department of Fire,* 534 So.2d 582 (La.App. 4th Cir. 1989); *Brumfield v. Department of Fire,* 488 So.2d 1181, (La.App. 4th Cir.1986), see also *New Orleans Ass'n of Firefighters Local 632 v. Civil Service Comm'n of the City of New Orleans,* 495 So.2d 958 (La.App. 4th Cir.1986); writ den. 499 So.2d 84 (La.1987). Rule IX, Sect. 1.2 provides:

> In every case of termination of employment of a regular employee, the appointing Authority shall conduct a pre-termination hearing as required by law and shall notify the employee of the disciplinary action being recommended prior to taking action. (adopted January 21, 1988, effective February 1, 1988).

Rule IX, Sect. 1.2 is a codification of constitutional law regarding the due process rights of civil service employees. Tenured civil service employees have a property interest in their continued employment. *Cleveland Bd. of Educ. v. Loudermill,* 470 U.S. 532, 538-39 (1985). In order to satisfy the procedural due process requirement, an individual must be given an opportunity for a hearing before he or she is deprived of any significant property interest. *Boddie v. Connecticut,* 401 U.S. 371, 379 (1971). More specifically, the United States Supreme Court has stated that the pre-termination hearing need not definitively resolve the propriety of the discharge. It should be an initial check against mistaken decisions – essentially, a determination of whether there are reasonable

grounds to believe that the charges against the employee are true and support the proposed action. The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story. Clearly, a civil service employee has a property interest in his continued employment with the New Orleans Police Department, and is entitled to notice and a hearing as articulated by the Supreme Court in *Loudermill.*

Further, in *Brumfield v. Department of Fire,* 488 So.2d 1181 (La.App. 4th Cir.1986), the Fourth Circuit Court of Appeal addressed the same arguments as in the instant case. It reversed the Commission's ruling that the superintendent of the fire department acted within the boundaries of the regulations of the Department of Fire in invoking Rule IX of the Civil Service Commission, i.e. dismissing plaintiff for inability or unwillingness to perform his duties. The Fourth Circuit reversed the decision of the Civil Service Commission agreeing with plaintiff's claim that he was denied due process because he was given no pre-termination opportunity to respond to the charges against him. The Court's basis for this ruling was the United States Supreme Court decision in *Cleveland Board of Education v. Loudermill,* 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985) and Rule IX of the Civil Service Commission rules. As stated by the court, "the *Loudermill* decision stated that the minimum due process requirement for a public employee facing dismissal is notice and a pre-termination

opportunity to respond." In accordance with *Loudermill,* the court set aside plaintiff's termination due to failure of compliance with the notice requirements; however, the Court specified that it was not passing on the reasons for plaintiff's dismissal. Furthermore, the Court stated that their holding did not preclude the right of the superintendent of the fire department and the Civil Service Commission to reconsider this matter after plaintiff was given notice and an opportunity to respond to the charges against him.

The Appointing Authority's termination of the Appellant was an unlawful violation of his procedural due-process rights. The Appellant received neither notice nor the opportunity to respond to the charges that resulted in his termination. He was not afforded a pre-termination hearing. He was never charged with the violation of any internal rule of the Appointing Authority. Any reliance on Civil Service Rule IX was misplaced and contrary to the rule's clear language.

As noted above, this decision does not preclude the Appointing Authority and the Civil Service Commission from reconsidering this matter after the Appellant is given notice and an opportunity to respond to the charges against him. However, in the interim, the Appointing Authority must reinstate the Appellant with all back pay and emoluments of employment because the termination was illegal. In *Perkins v. Sewerage and Water Board,* 669 So.2d 726, 729 (La. App. 4th Cir. 1996), the Fourth Circuit ruled that the Commission does not have the authority to

order any remedy short of reinstatement and full back pay where the Appointing Authority has failed to comply with due process requirements. In such cases, the Commission has no discretionary authority regarding the penalty including the date of reinstatement.

Based upon the foregoing, the appeal is GRANTED. The Appointing Authority is ordered to reinstate the Appellant with all back pay and emoluments of employment.

RENDERED AT NEW ORLEANS, LOUISIANA THIS 6TH DAY OF DECEMBER, 2006.

/s/ Dana M. Douglas
DANA M. DOUGLAS,
COMMISSIONER

CONCUR:

/s/ Blaine Lecesne
BLANE G. LECESNE,
VICE-CHAIRMAN

/s/ William R. Forrester, Jr.
WILLIAM R. FORRESTER, JR.
CHAIRMAN

APPENDIX C

The Supreme Court of the State of Louisiana

WILLIE LEE

VS.

DEPARTMENT OF POLICE NO. 2007-C-2440

AND ALL OTHER
CONSOLIDATED CASES

IN RE: Lee, Willie; – Plaintiff; Applying for Writ of Certiorari and/or Review Civil Service Commission City of New Orleans, No. 7099; to the Court of Appeal, Fourth Circuit, No. 2006-CA-0171

February 15, 2008

Denied.

PFC

CDK

BJJ

JPV

CDT

JTK

JLW

Supreme Court of Louisiana
February 15, 2008

/s/ Katherine A. Fontana
Deputy Clerk of Court
For the Court

APPENDIX D & E

5th Amendment of the U.S. Constitution provides that:

> No person . . . shall be deprived of life, liberty, or property, without due process of law . . .

14th Amendment of the U.S. Constitution provides that:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the law.

Supreme Court, U.S.
FILED
JAN 8 - 2009
OFFICE OF THE CLERK

No. 08-159

In The Supreme Court of the United States

WILLIE LEE,

Petitioner,

versus

DEPARTMENT OF POLICE,

Respondent.

On Petition For Writ Of Certiorari To The Louisiana Court Of Appeal, Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

VICTOR L. PAPAI, JR.
JAMES B. MULALLY
Assistant City Attorneys
1300 Perdido Street – Room 5E03
New Orleans, LA 70112
Telephone: (504) 658-9800

NOLAN P. LAMBERT
Chief Deputy City Attorney

PENYA MOSES-FIELDS
City Attorney

Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED FOR REVIEW

In *Cleveland Bd. Of Educ. v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985), this Court held that, ordinarily, a civil servant may not be terminated or deprived of the property right in his job without a pre-deprivation hearing giving him an opportunity to respond or refute the charges against him. However, this Court also recognized that certain exceptions apply to this general rule.

The New Orleans Civil Service Commission ruled that the city government violated the Petitioner's right to due process of law when the Petitioner was terminated without a pre-termination hearing. The Louisiana, Court of Appeal, Fourth Circuit, and subsequently the Louisiana Supreme Court, held that the New Orleans Police Department could discipline officers without a pre-termination hearing under extraordinary events such as Hurricane Katrina. These courts further held that the post-termination hearing, which allowed for the presentation of all relevant evidence that would have been introduced at a pre-termination hearing, satisfied the due process requirements of both the United States and Louisiana Constitutions.

The issue presented for review is: Whether individual due process rights for tenured civil service employees may be satisfied by a post-termination hearing, under unique circumstances or extraordinary events such as a hurricane or flood, despite the requirement of a pre-termination hearing as set forth in *Loudermill*.

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF JURISDICTION 1

STATEMENT OF THE CASE 1

I. Facts Relevant to the Petition 1

II. Procedural History and the Opinions Below 3

ARGUMENT 4

CERTIORARI IS NOT WARRANTED BECAUSE THE LOWER COURTS' INTERPRETATION OF THE LAW IS NOT CONTRARY TO THE STANDARD ESTABLISHED IN *LOUDERMILL*, AS *LOUDERMILL* ALLOWS FOR AN EXCEPTION TO THE PRETERMINATION HEARING REQUIREMENT IN CERTAIN CIRCUMSTANCES 4

CONCLUSION 12

TABLE OF AUTHORITIES

Page

CASES

Allen v. Dept. of Police, 129 S.Ct. 236 (2008).....12

Bianchi v. City of Philadelphia, 183 F.Supp.2d 726 (E.D. Pa. 2002).....8, 9, 13

Bell v. Dep't of Health & Human Res., 483 So.2d 945 (La. 1986).....4

Boddie v. Conn., 401 U.S. 371 (1971).....8, 13

City of Los Angeles v. David, 538 U.S. 715 (2003).....7

Cleveland Bd. Of Educ. v. Loudermill, 470 U.S. 532 (1985).....4, 5, 6, 9, 13

Davis v. New Orleans Police Department, 899 So.2d 37 (La. App. 4 Cir. 2005).....2

FDIC v. Mallen, 486 U.S. 230 (1988).....6

Gilbert v. Homar, 520 U.S. 924 (1997).....7, 8, 13

Graham v. Van Osdale, 25 F.3d 1048 (Mich. App. 6th Cir. 1994).....6

Jones v. City of Gary, Ind., 57 F.3d 1435 (Ind. App. 7th Cir. 1995).....6

Hudson v. Palmer, 468 U.S. 517 (1984).....10

Marks v. New Orleans Police Dept., 943 So.2d 1028 (La. App. 4 Cir. 2006).....2

Mathews v. Eldridge, 424 U.S. 319 (1976).....5, 6, 7, 13

Morrisey v. Brewer, 408 U.S. 471 (1972).....5, 6

Parratt v. Taylor, 451 U.S. 537 (1981).....10

TABLE OF AUTHORITIES – Continued

Page

U.S. v. James Daniel Good Real Property, 510 U.S. 43 (1993) 7

Wilkinson v. Austin, 545 U.S. 209 (2005) 7

STATUTES

28 U.S.C. § 1257(a) 1

La. Const. art. I, § 2 (1974) 4

STATEMENT OF JURISDICTION

This court has subject matter jurisdiction over this case under 28 U.S.C. § 1257(a), which confers jurisdiction on the Court by writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

STATEMENT OF THE CASE

I. Facts Relevant to the Petition

The Petitioner was a police officer with the New Orleans Police Department and a classified employee in the civil service system. On Saturday, August 27, 2005, the Superintendent of the New Orleans Police Department placed the Department on "Activation Status" in order to mobilize personnel in preparation for Hurricane Katrina, which struck the City of New Orleans the following day. Pursuant to this activation, all essential personnel were required to report to and remain on duty until relieved by the Superintendent. The Petitioner was considered essential personnel but did not report to duty as required. As the Petitioner had still not reported to duty by October 24, 2005, the Department terminated his employment.

The Petitioner is one of a group of officers who did not report for duty during and in the immediate aftermath of Hurricane Katrina. Following Katrina, the Department's Public Integrity Bureau was tasked with investigating hundreds of claims against officers

that failed to report, like the Petitioner, or who abandoned their post during or subsequent to the hurricane. The Bureau was operating with a reduced staff and operating out of makeshift offices with little to no supplies or resources. The Bureau was also operating under the assumption that all claims against these officers that were not fully investigated within a sixty day period would be dismissed.[1]

In order to manage the daunting task of investigating these complaints in the wake of the storm, the Bureau divided abandonment cases into two categories: 1) officers who had abandoned their posts and not returned by a certain date; and, 2) officers who had abandoned their posts but eventually returned to duty seeking reinstatement. Because officers who had returned to duty were present and available, they were afforded pre-termination hearings. Those who had abandoned their posts and not returned were not afforded pre-termination hearings, as the Bureau's limited resources post-Katrina hampered their ability locate these officers. These officers, including the Petitioner, were afforded post-termination hearings.

---

[1] The sixty day requirement was established in *Davis v. New Orleans Police Department*, 899 So.2d 37 (La. App. 4 Cir. 2005), *writ denied*, 902 So.2d 1057 (La. 5/20/05). This ruling was abrogated by the Louisiana Supreme Court in *Marks v. New Orleans Police Department*, 943 So.2d 1028 (La. 11/29/06).

II. Procedural History and Opinions Below

The Petitioner appealed his termination to the New Orleans Civil Service Commission on March 9, 2006. The Commission reviewed the matter, granted the appeal, and ordered the Department to reinstate the Petitioner solely on the basis that no pre-termination hearing took place. The Commission found this to be a violation of the Petitioner's due process rights.

The Respondent appealed the Commission's decision to the Louisiana Court of Appeal, Fourth Circuit, and that Court ordered an *en banc* review. Numerous terminated officers similarly situated to the Petitioner appealed as well. The Louisiana appellate court consolidated all cases similarly situated. On October 10, 2007, the Louisiana Court of Appeal, Fourth Circuit, reversed the New Orleans Civil Service Commission. The Court found that:

> We can hardly envision a scenario when enforcing appropriate standards of conduct was ever more important than in the aftermath of Hurricane Katrina. In addition, we find that the [Civil Service Commission's] rulings relying solely on the absence of a pre-termination hearing when truly extraordinary circumstances present themselves would set a dangerous precedent on future disciplinary actions of the [New Orleans Police Department].

Petitioner then filed a writ of certiorari to the Louisiana Supreme Court, which was denied on

February 15, 2008. This request for writ of certiorari followed.

ARGUMENT

CERTIORARI IS NOT WARRANTED BECAUSE THE LOWER COURT'S INTERPRETATION OF THE LAW IS NOT CONTRARY TO THE STANDARD ESTABLISHED IN *LOUDERMILL*, AS *LOUDERMILL* ALLOWS FOR AN EXCEPTION TO THE PRE-TERMINATION HEARING REQUIREMENT IN SOME CIRCUMSTANCES.

The Petitioner seeks a writ of certiorari from the 2008 decision of the Louisiana Court of Appeal, Fourth Circuit, certiorari denied by the Louisiana Supreme Court, which held the Petitioner's due process rights were not violated when he was terminated without a pre-termination hearing.[2]

Although this Court established in *Loudermill* that the appointing authority ordinarily must give a

[2] An interest in life, liberty, or property is a prerequisite to any due process challenge. *Bell v. Dep't of Health & Human Res.*, 483 So.2d 945 (La. 1986), *cert. denied*, 479 U.S. 827, 107 S.Ct. 105 (1986). Article I, § 2 of the 1974 Louisiana Constitution provides that an employee who has obtained classified civil-service status has a property right in his employment. Tenured or classified civil service status is a property right within the meaning of this Louisiana Constitutional provision, and thus guarantees due process. *Bell*, 483 So.2d 945 at 949. The Respondent does not challenge that the Petitioner had a property right in his employment for the purposes of this case.

civil servant the right to be heard *before* he is terminated from his position, the Court also acknowledged that there are some situations in which a post-deprivation hearing will satisfy due process requirements. 470 U.S. at 542 n.7. In the post-Katrina emergency landscape, a post-deprivation hearing such as the one afforded to the Petitioner sufficiently preserves an employee's due process rights.

I. Due process is not a fixed concept, and must be assessed in light of the demands of a particular situation.

"[D]ue process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Morrisey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972). In *Loudermill*, this Court recognized some situations in which a post-deprivation hearing will satisfy due process requirements. 470 U.S. at 542 n.7. "[T]he precise form and extent of process required in a particular situation will vary from other factual situations." *Mathews*, 424 U.S. at 332.

The Petitioner's strict interpretation of *Loudermill* is inaccurate, and inconsistent with other rulings by this Court. *Loudermill* cannot be read to require a uniform process in order to secure an employee's due process rights. *See Mathews v. Eldridge,* 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976); *Morrisey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972). *Loudermill* merely establishes that, **in ordinary circumstances**, an employee must be afforded a pre-termination hearing. The nature of due process protections as established by this Court, as well as the exceptions acknowledged in *Loudermill*, allow for alternative means in securing due process rights. The fact that the Petitioner was not afforded a pre-termination hearing is not a per se violation of the Petitioner's due process rights.

II. The Government interest justifies the postponement of the opportunity to be heard until after the initial deprivation.

"An important government interest, accompanied by a substantial assurance that the deprivation is not baseless or unwarranted, may in limited cases demanding prompt action justify postponing the opportunity to be heard until after the initial deprivation." *FDIC v. Mallen*, 486 U.S. 230, 240, 108 S.Ct. 1780, 100 L.Ed.2d 265 (1988). *See also Graham v. Van Osdale,* 25 F.3d 1048 (Mich. App. 6th Cir. 1994); *Jones v. City of Gary, Ind.*, 57 F.3d 1435, 1441 (Ind. App. 7th Cir. 1995). When determining whether governmental procedures comport with the requirements of the

Constitution, the court must balance "the private interest that will be affected by the official action," "the risk of an erroneous deprivation of such interest through the procedures used," with "the Government's interest." *Gilbert v. Homar*, 520 U.S. 924 (1997) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)). *See also City of Los Angeles v. David,* 538 U.S. 715, 716 (2003); *Wilkinson v. Austin,* 545 U.S. 209, 211 (2005); *U.S. v. James Daniel Good Real Property,* 510 U.S. 43 (1993).

The Petitioner did not display a significant interest in his continued employment. The Petitioner was ordered to report for duty on August 27, 2005. The Petitioner did not report for duty as ordered and abandoned his post. Even after being notified that his abandonment was to result in a thirty day suspension, the Petitioner did not return or notify the appropriate supervisors of an intent to do so. The Petitioner's failure to report to duty, even after being disciplined, is indicative of a diminished interest at best.

Furthermore, the Respondent took active measures to ensure that the risk of erroneous or wrongful termination was nearly nonexistent. The Respondent separated officers who had completely abandoned their post from those who returned to duty, and adjusted the disciplinary measures imposed on officers accordingly. Additionally, the Respondent afforded all officers who did not return to duty, regardless of how long they had abandoned their employment, a fair and thorough post-termination

hearing. This hearing allowed officers to fully present the same evidence that they would in a pre-termination hearing, and provided a safeguard against wrongful termination. *Lee v. Department of Police and all other Consolidated Cases*, No. 06-CA-1498 (La. App. 4th Cir. 2006).

Finally, the Government's interest in providing alternative means of securing the Petitioner's due process rights is considerable. The Respondent had a significant interest in ensuring public safety in the wake of Hurricane Katrina. Dependable public servants were essential to the control and rehabilitation of the City. All resources – including financial resources – were strained to an unprecedented extent, and the Respondent had a tremendous interest to remove non-working police officers from the payroll.

III. Hurricane Katrina constitutes an emergency situation for the purposes of postponing a hearing until after termination.

"[I]n some emergency situations, the employer can postpone the hearing until after the deprivation." *Bianchi v. City of Philadelphia*, 183 F.Supp.2d 726, 742 (E.D. Pa. 2002) (citing *Boddie v. Conn.*, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971)). **This Court recognized in *Gilbert v. Homar* that "where a State must act quickly, or where it would be impractical to provide pre-deprivation process, post-deprivation process satisfies the requirements of the Due process Clause." 520 U.S. 924**

(1997). Again, this court acknowledged the need for such exceptions in *Loudermill*. 470 U.S. at 542 n.7.

The aftermath of Hurricane Katrina constitutes one of the greatest disasters in modern history. The aftermath is so significant, in fact, that the lower court specifically stated that it is "unnecessary . . . to describe the emergency conditions existing in New Orleans during and after Hurricane Katrina." *Lee v. Department of Police and all other Consolidated Cases*, No. 06-CA-1498 (La. App. 4th Cir. 2006). Pre-termination hearings were not only logistically difficult to accomplish in light of the diminished manpower and resources post-Katrina, but they were made nearly impossible due to the Petitioner and other similarly situated officers' absence. Often times, these officers' whereabouts were unknown. The state of emergency created by Hurricane Katrina is precisely the type of emergency that the exception in *Loudermill* and other similar cases intended to address. *See Loudermill*, 470 U.S. at 542 n.7. *See also Bianchi v. City of Philadelphia*, 183 F.Supp.2d 726, 742 (E.D. Pa. 2002).

The Petitioner contends that, even if there are circumstances in which the post-termination hearings are an adequate alternative, the Louisiana Court of Appeal, Fourth Circuit, failed to distinguish which circumstances would suffice to qualify for this exception. This is not a sufficient ground for a grant of certiorari. If the Court finds that the Respondent's actions were proper, and that the unique circumstances subsequent to Hurricane Katrina allowed for

an exception to the pre-termination hearing requirement, then there are no grounds on which certiorari should be granted. In this particular situation, under these unique conditions, a post-deprivation hearing was a sufficient due process protection.

The Petitioner places significant emphasis on the *Parratt-Hudson* doctrine, which has established that in certain circumstances a post-deprivation hearing was not feasible. The Petitioner attempts to distinguish this doctrine by stating that the instant case is not one of unusual circumstances in which a pre-deprivation hearing was not feasible, as is the case in both *Parratt* and *Hudson*. *See Parratt v. Taylor*, 451 U.S. 537 (1981); *Hudson v. Palmer*, 468 U.S. 517 (1984). The case at bar is one involving one of the greatest emergency and disaster situations of the country's history, and the exigent circumstances that resulted from Hurricane Katrina rendered a pre-deprivation hearing unfeasible. Most notably, those who now assert their right to a pre-termination hearing had fled the city and not reported their whereabouts to their supervisors. Quite simply, pre-termination hearings for these individuals were not feasible. To find that the post-termination hearing for these individuals was insufficient to satisfy their due process rights would set a dangerous precedent, and would require city officials to waste precious resources locating individuals who quite possibly were scattered throughout the country.

The Petitioner further contends that, even if there are circumstances in which the post-termination

hearings are an adequate alternative, the Louisiana Court of Appeal, Fourth Circuit, failed to distinguish which circumstances would suffice to qualify for this exception. This is not a sufficient ground for grant of certiorari. If the Court finds that the Respondent's actions were proper, and that the circumstances of Hurricane Katrina allowed for an exception to the pre-termination hearing requirement, then there are no grounds on which certiorari may be granted. To find otherwise would be a waste of judicial resources, and is a request for the Court to legislate regulations as opposed to determine the legal issues of the instant case. The particular circumstances of the case at bar are considerably unique. The Respondent's actions were in response to an overwhelming, catastrophic situation, and the Respondent took proactive measures to ensure the due process rights of the Petitioner and other similarly situated officers were satisfied to the best of their ability considering the extreme circumstances.

Additionally, the Petitioner alleges that the Respondent sought to suspend the Petitioner's due process rights. The Petitioner calls on this Court to address under what unique circumstances a government can suspend the Due Process Clause of the United States Constitution. This considerably overstates the Respondent's position, and calls upon the Court to make yet another unnecessary determination. The Respondent did not seek to suspend the Petitioner's due process rights. Rather, the Respondent sought to satisfy the Petitioner's due process

rights through alternative means, as the ordinary procedures could not be followed due to the circumstances caused by Hurricane Katrina.

Finally, this Court has previously denied certiorari in a nearly identical case. *Allen v. New Orleans Police Dept.*, 129 S.Ct. 236 (2008). The Petitioner's instant brief requesting writ of certiorari is nearly identical to a brief submitted in May of this year, raising identical issues of law and asking the Court to determine questions far beyond the scope of the case at bar.

CONCLUSION

Given the extraordinary conditions caused by Hurricane Katrina, the Due Process rights of the Petitioner were not violated when he was not afforded a pre-termination hearing. The Civil Service Commission conducted post-termination hearings for Petitioner and similarly situated officers, which were in accordance with the principal of law espoused for the property right protection, and was a valid balancing act by the government for those officers who abandoned their duty.

In advocating this position, the Respondent is not seeking to reverse well-settled precedent or repudiate the general requirement for conducting pre-termination hearings in ordinary circumstances established in *Loudermill*. Rather, the Respondent asserts that the conditions that existed post-Katrina constituted

extraordinary circumstances during which alternative measures were necessary in order to secure the Petitioner's due process rights. This exception is allowed under the *Loudermill* decision, and is a limited extension of the flexible due process requirements of *Bianchi, Boddie, Gilbert,* and *Mathews.* The writ should be denied.

Respectfully submitted,

VICTOR L. PAPAI, JR.
JAMES B. MULALLY
Assistant City Attorneys
1300 Perdido Street – Room 5E03
New Orleans, LA 70112
Telephone: (504) 658-9800

NOLAN P. LAMBERT
Chief Deputy City Attorney

PENYA MOSES-FIELDS
City Attorney

Counsel for Respondent